

SPOUSE ATTORNEYS

Ethics Committee Formal Opinion

10/23/81

Reviewed by Board of Governors 11/19/81

On November 17, 1976, the Ethics Committee of the New Hampshire Bar Association issued the following informal opinion:

"A law firm employing a lawyer whose spouse is employed as a lawyer by another law firm should disclose that fact to its client if the second firm represents one or more clients whose interests do or might conflict with the interests of the client of the first firm. Even if the client does not object, a husband and wife employed by different firms should not work on the same litigated case or non-litigated matter."

Upon further reconsideration, study and input, the Ethics Committee has decided to adopt the guidelines as set forth in ABA Formal Opinion 340, dated September 23, 1975. However, if spouses employed by different law firms work directly on the same litigated case or non-litigated matter, then disclosure must be made to the respective clients and their consent obtained. To the extent the former opinion of November 17, 1976 is inconsistent with Formal Opinion 340, the November 17, 1976 opinion is overruled.

# AMERICAN BAR ASSOCIATION

## COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 340

September 23, 1975

Where both husband and wife are lawyers but they are not practicing in association with one another, they are not necessarily prohibited from representing different interests or from being associated with firms representing differing interests. Like all lawyers, they must obey all disciplinary rules; a particular situation may be inherently difficult because of the close relationship between husband and wife. In any situation where a client or potential client might question the loyalty of the lawyer representing him, the situation should be fully explained to the client and the question of acceptance or continuance of representation left to the client for decision.

Where both husband and wife are lawyers but they are not practicing in association with one another, may they or their firms represent differing interests?

This question, in varying forms, has been presented to this Committee with some frequency recently. Some firms apparently have been reluctant to employ one spouse-lawyer where that person's husband or wife is, or may soon be, practicing with another firm in the same city or area. On the other hand, some law schools have expressed disapproval of the practice by some firms in their hiring practices of attaching grave importance to the fact that the law student under consideration is married to a lawyer or a law student. Some law firms are concerned whether a law firm is disqualified, by reason of its employment of one spouse, to represent a client opposing an interest represented by another law firm that employs the husband or wife of the inquiring firm's associate. Some of the circumstances bearing on this question include whether the fee of either firm is contingent, whether the disputed matter is one of negotiation or litigation, and whether the married lawyer in question will or will not actually be working on the particular matter. Another variation of the problem is the situation in which a governmental agency, such as a district attorney or an attorney general, is the employer of either the husband or the wife, and the spouse is associated with a law firm in the same community.

The problem undoubtedly will arise with increasing frequency and in different settings, for it is a fact of modern society that women are entering the profession in increasing numbers and that increasing numbers of these women are married to lawyers. Clearly, today it is not uncommon for husband and wife lawyers to be practicing in different offices in the same city, and the current enrollment of women in law schools indicates that women lawyers will constitute a greater percentage of the bar in the future than now.

It is not necessarily improper for husband-and-wife lawyers who are practicing in different offices or firms to represent differing interests. No disciplinary rule expressly requires a lawyer to decline employment if a husband, wife, son, daughter, brother, father, or other close relative represents the opposing party in negotiation or litigation. Likewise, it is not necessarily improper for a law firm having a married partner or associate to represent clients whose interests are opposed to those of other clients represented by another law firm with which the married lawyer's spouse is associated as a lawyer.

A lawyer whose husband or wife is also a lawyer must, like every other lawyer, obey all disciplinary rules, for the disciplinary rules apply to all lawyers without distinction as to marital status. We cannot assume that a lawyer who is married to another lawyer necessarily will violate any particular disciplinary rule, such as those that protect a client's confidences, that proscribe neglect of a client's interest, and that forbid representation of differing interests. Yet it also must be recognized that the relationship of husband and wife is so close that the possibility of an inadvertent breach of a confidence or the unavoidable receipt of information concerning the client by the spouse other than the one who represents the client (for example, information contained in a telephoned message left for the lawyer at home) is substantial. Because of the closeness of the husband-and-wife relationship, a lawyer who is married to a lawyer must be particularly careful to observe the suggestions and requirements of EC 4-1, EC 4-5, EC 5-1, EC 5-2, EC 5-3, EC 5-7, DR 4-101, and DR 5-101.

Even though the representation by husband and wife of opposing parties is not a violation of any disciplinary rule, the possibility of a violation of DR 5-101, in particular, is real and must be carefully considered in each instance. If the interest of one of the marriage partners as attorney for an opposing party creates a financial or personal interest that reasonably might affect the ability of a lawyer to represent fully his or her client with undivided loyalty and free exercise of professional judgment, the employment must be declined. We cannot assume, however, that certain facts, such as a fee being contingent or varying according to results obtained, necessarily will involve a violation of DR

5-101(A). In some instances the interest of one spouse in the other's income resulting from a particular fee may be such that professional judgment may be affected, while in other situations it may not be; the existence of such interest is a fact determination to be made in each individual case. Wherever one spouse is disqualified under DR 5-101(A), the entire firm is disqualified under DR 5-105(D).<sup>1</sup>

In any event, the advice contained in EC 5-3 and EC 5-16 is appropos; the lawyer should advise the client of all circumstances that might cause one to question the undivided loyalty of the law firm and let the client make the decision as to its employment. If the client prefers not to employ a law firm containing a lawyer whose spouse is associated with a firm representing an opposing party, that decision should be respected.

The views expressed in this opinion are consistent with the views expressed by other committees in regard to the close relationships of opposing lawyers. For example, it has been held that a father and son may represent opposite sides in litigation: See Opinion 19 (January 23, 1963), Professional Ethics Committee of the Kansas Bar Association; Opinion 48; Missouri Advisory Opinions. In its Opinion No. 170 (1970), the New Jersey Advisory Committee on Professional Ethics held it is not improper for a lawyer to represent an indigent when the lawyer's brother is employed by the prosecutor's office.<sup>2</sup>

Accordingly, we conclude that a law firm employing a lawyer whose spouse is a lawyer associated with another local law firm need not fear consistent or mandatory disqualification when the two firms represent opposing interests; yet it is both proper and necessary for the firm always to be sensitive to both the possibility of disqualification and the wishes of its clients. Marriage partners who are lawyers must guard carefully at all times against inadvertent violations of their professional responsibilities arising by reason of the marital relationship.

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1. As amended February, 1974, DR 5-105(D) provides: "If a lawyer is required to decline employment or to withdraw from employment under a Disciplinary Rule, no partner, or associate, or any other lawyer affiliated with him or his firm, may accept or continue such employment."

2. But see Opinion No. 288 (1974) of the New Jersey Advisory Committee on Professional Ethics which held that a "wife should not be permitted to practice criminal defense law in New Jersey while her husband is" a deputy attorney general assigned to the Appellate Section of the Division of Criminal Justice.